

YAVAPAI COUNTY ATTORNEY'S OFFICE
JOSEPH C. BUTNER SBN 005229
DEPUTY COUNTY ATTORNEY
255 East Gurley Street
Prescott, AZ 86301
Telephone: 928-771-3344
ycao@co.yavapai.az.us

RECEIVED
NIGHT DEPOSITORY

2010 JUL 15 PM 6:48

FILED

B. Chamberlain

DEPUTY CLERK

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

The Honorable Warren Darrow

STATE'S MEMORANDUM RE EX
PARTE COMMUNICATIONS

FILED UNDER SEAL

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Memorandum Regarding Ex Parte Communications relative to the State's recently-filed Motion for Determination of Counsel and Defendant's Position on State's Motion for Determination of Counsel.

MEMORANDUM OF POINTS AND AUTHORITIES

Law and Argument

The State objects to any ex parte communication between Defendant, his counsel, and this Court relating to defense counsels' continued representation in light of the insurance issues. Defendant seeks future permission to communicate with this Court in an ex parte manner regarding this issue. It simply cannot be done.

A lawyer's ethical obligation prevents him from communicating ex parte with the

RECEIVED

JUL 19 2010

DIVISION 6

1 trial judge. ER 3.5 of Arizona Supreme Court Rule 42, Rules of Professional Conduct,
2 provides that a lawyer shall not communicate ex parte with a judge during the proceedings
3 unless authorized to do so by law or court order. The 2003 comment to the rule refers
4 lawyers to the Code of Judicial Conduct, [former] Canon 3(B)(7) for authorized *ex parte*
5 communications.

6
7 The provisions relating to a judge's authority to entertain ex parte communications is
8 now found in Rule 81, Arizona Code of Judicial Conduct, Canon 2, Rule 2.9. (Amended
9 2009). As applicable to this proceeding, that Rule provides: "(A) A judge shall not initiate,
10 permit, or consider ex parte communications, or consider other communications made to the
11 judge outside the presence of the parties or their lawyers, concerning a pending or impending
12 matter, except as follows: ... (5) a judge may initiate, permit, or consider any ex parte
13 communication when expressly authorized by law to do so." This is the only exception to the
14 rigid bar on ex parte communications which could potentially be construed to allow
15 Defendant to communicate with the Court in this fashion.

16
17 In *State v. Apelt*, 176 Ariz. 349, 861 P.2d 634 (1993) the Supreme Court found that
18 there was no constitutional, statutory or case law authority for granting the capital defendant
19 an ex parte hearing regarding the need for expert assistance and denied the defendant's
20 request.

21
22 Michael requested that the trial court hold an *ex parte* hearing so he could
23 present a request for expert assistance under A.R.S. § 13-4013 without
24 "tipping his hand" to the prosecution. The trial court denied the request,
25 noting that there was no authority for such a hearing. Therefore, it would
26 violate Canon 3(A)(4) of the Code of Judicial Conduct, which forbids *ex parte*
proceedings except where authorized by law. Defendant claims that
this denial was error and deprived him of the opportunity to request expert
assistance.

1 We agree with the trial court that there is no authority for granting an
2 indigent defendant an *ex parte* hearing regarding his or her need for expert
3 assistance. None of the cases cited by defendant establishes such a right.
4 Federal cases are not helpful because 18 U.S.C. § 3006A(e) expressly
5 authorizes *ex parte* applications and proceedings in federal court. We are
6 aware of no comparable state statute. Nor do we believe that a reference to *ex*
7 *parte* proceedings in *State v. Fisher*, 152 Ariz. 116, 118, 730 P.2d 825, 827
8 (1986) is authority for a *right* to such proceedings.

9 [28] [29] In addition, we do not believe that the Fourteenth Amendment's
10 guarantees of due process and equal protection encompass such a right.
11 Neither due process nor equal protection requires that the state equalize the
12 resources of the indigent and the wealthy defendant. *Ross v. Moffitt*, 417 U.S.
13 600, 616, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341 (1974). Rather, they
14 guarantee the indigent an opportunity to present his or her claims adequately
15 and fairly. *Id.* To put it another way, they assure the indigent defendant
16 access to the "basic tools" of an adequate defense. *Ake v. Oklahoma*, 470
17 U.S. 68, 77, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985).

18 176 Ariz. at 364-65, 861 P.2d 650.

19 Defendant attempts to bring the current issue under this "authorized by law"
20 exception by citing to Rules of Professional Conduct, specifically ER 1.6 relating to
21 confidentiality of information. However, nothing in that Rule specifically allows *ex parte*
22 communications relating to such matters. In fact, defense counsel is specifically authorized
23 to reveal such information relating to their representation of Defendant to establish a claim or
24 defense to the allegations which have been raised or to respond to allegations concerning the
25 representation of the client. ER 1.6(d)(4).

26 What is particularly disconcerting is that an *ex parte* contact could require reversal of a
jury verdict. In *McElhanon v. Hing*, 151 Ariz. 403, 728 P.2d 273 (1986) the Supreme Court
looked long and hard at the *ex parte* conference held between judgment creditor, judgment
creditor's attorney, and the trial court. The trial judge initiated the *ex parte* conference in order
to explain the absence of his belief that the creditor's attorney was guilty of ethical
improprieties. The court even obtained the consent of adverse counsel. However, during the

1 ex parte conference counsel expanded the subject of the conference by accusing defendant and
2 his counsel of perjury. The Supreme Court held that the ex parte conference was improper.
3 151 Ariz. at 409, 728 P.2d at 279.

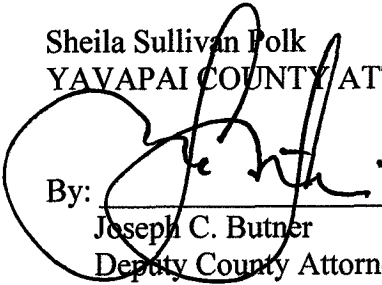
4 Before making its final determination whether reversal was required, however, the
5 Court considered (1) presumed prejudice; (2) appearance of impropriety; and (3) actual
6 prejudice. Finding that no actual prejudice existed, the reversal ordered by the Court of
7 Appeals because of the ex parte communications was vacated. However, various other factors
8 mitigating the ex parte contact which are not present in the instant matter were considered by
9 the Supreme Court before it made its ultimate decision. The State prefers to avoid any
10 potential claim of error or reversal on appeal of Defendant's conviction.

11 Conclusion

12 "The participation in the actual decision making process by only one party to a
13 controversy is inimical to the notions of fairness which underlie the due process of law."
14 *Western Gillette, Inc. v. Ariz. Corporation Comm.*, 121 Ariz. 541, 542-43, 592 P.2d 375, 376-
15 77. Absent lawful authority authorizing such ex parte communication, Defendant should be
16 prevented from addressing the Court without the State's opportunity to be heard.

17 RESPECTFULLY SUBMITTED this 15th July, 2010.

18
19
20
21 Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

22
23 By: 
24 Joseph C. Butner
Deputy County Attorney

25 COPIES of the foregoing delivered this
26 15th day of July, 2010 to:

Office of the Yavapai County Attorney

255 E. Gurley Street, Suite 300

Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

1 Honorable Warren R. Darrow
2 Yavapai County Superior Court
(via email)

3 John Sears
4 511 E.. Gurley St.
5 Prescott, AZ 86301
6 Attorney for Defendant
(via email)

7 Larry Hammond
8 Anne Chapman
9 Osborn Maledon, P.A.
2929 North Central Ave, 21st Floor
10 Phoenix, AZ
Attorney for Defendant
(via email)

11
12 By: 